

RENDERED: October 17, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2716-MR

RORY BURDETTE HUNTER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS PAISLEY, JUDGE
ACTION NO. 96-CR-0298

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: GUDGEL, KNOPF, and SCHRODER, JUDGES.

KNOPF, JUDGE. Rory Burdette Hunter brings this direct appeal of the August 13, 1996, final judgment and sentence of imprisonment of the Fayette Circuit Court, following his conviction by a jury for trafficking in a controlled substance, KRS 218A.1412 and possession of drug paraphernalia, KRS 218A.500. After reviewing the issues raised by Hunter, the record and the applicable law, we affirm the conviction.

In May 1996, in response to citizen complaints, the Lexington Police Department started an investigation of alleged drug transactions in the neighborhood of Seventh and Dakota Streets. As a part of the investigation, the police engaged a confidential informant to make drug buys in the area. On May 6,

1996, the police met with the confidential informant and discussed the procedures for the operation that night. The police searched the confidential informant and his automobile both prior to and after the transactions to confirm he had no other drugs in his possession. They also placed a microphone transmitter in the confidential informant's vehicle, which allowed them to listen contemporaneously to and record conversations associated with the drug transactions.

At approximately 10:30 p.m., the confidential informant drove to the area of Seventh and Dakota Streets while four (4) police officers positioned themselves in another vehicle a block from the area. While on Dakota Street, the confidential informant was approached by a black male who offered to sell him cocaine. The confidential informant purchased two (2) \$20.00 pieces of crack cocaine from the individual with the money the informant had received from the police. During the transaction, the police heard the confidential informant give a description of the seller. As soon as the confidential informant signalled by verbal cue that the transaction was completed, the police drove to the scene. As they arrived, they saw Hunter, who fit the description given earlier and who was only a short distance behind the confidential informant's automobile. No other person was in the immediate vicinity. The police arrested Hunter. During a personal search, the police found a small quantity of crack cocaine and a \$20.00 bill in his coat. They also seized a crack pipe discovered very near Hunter.

On April 16, 1996, the Fayette County Grand Jury indicted Hunter on one felony count of trafficking in a controlled substance and one misdemeanor count of possession of drug paraphernalia. On July 9, 1996, Hunter was tried and convicted by a jury on both counts of the indictment. On August 9, 1996, the circuit court found Hunter guilty of the two (2) offenses and sentenced him to serve five (5) years in prison on count one for trafficking in a controlled substance and twelve (12) months in jail on count two for possession of drug paraphernalia with the sentences to run concurrently for a total sentence of five (5) years. The final judgment and sentence of imprisonment was entered on August 13, 1996. This appeal followed.

Hunter argues the circuit court erred by failing to grant his motion for a mistrial and his motion for a directed verdict. The motion for mistrial was made during the testimony of Detective Lawrence Weathers, who was the officer that arrested Hunter. Detective Weathers stated that Hunter refused to give the police his name after the arrest. The prosecutor asked Detective Weathers how the police learned appellant's name. Detective Weathers testified that he telephoned the jail personnel after Hunter had been incarcerated to see if they knew him "because a lot of times people at the jail come in contact with people more than we do" He stated that the jail personnel did know Hunter so they had his name when Detective Weathers telephoned the jail. Defense counsel immediately moved

for a mistrial arguing that this testimony created prejudice because it implied that Hunter had been a resident of the Fayette County Detention Center. The Commonwealth argued before the trial judge that the information was more probative than prejudicial. The trial court denied the motion without stating a reason and the trial continued.

In Hunter's appellate brief, he contends Detective Weather's testimony on Hunter's name touched on other potential crimes. He argues that while Kentucky Rule of Evidence (KRE) 404(b) allows evidence of other crimes or wrongs to prove identity, the Commonwealth violated KRE 404(c), which requires the prosecution to give reasonable pretrial notice if it intends to introduce evidence pursuant to subdivision (b). See generally, Gray v. Commonwealth, Ky., 843 S.W.2d 895 (1992). We need not address this argument because it was not preserved for appellate review. Where the grounds for an objection presented to the appellate court are different from those asserted before the trial court, they are not properly preserved for appellate review. Charles v. Commonwealth, Ky., 634 S.W.2d 407, 409 (1982); Daugherty v. Commonwealth, Ky., 572 S.W.2d 861, 863 (1978); Allen v. Commonwealth, Ky. App., 901 S.W.2d 881, 884 (1995). As the court stated in Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1977), "The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." See also, Booth v. Commonwealth, Ky., 675 S.W.2d 856, 858 (1984). The role of the appellate court is one

of review, which presupposes that the trial court has had a prior opportunity to consider the issue. Todd v. Commonwealth, Ky., 716 S.W.2d 242, 251 (1986). Hunter did not present the notice issue under KRE 404(c) to the trial court; therefore, he cannot obtain relief in this Court on that ground.

Hunter also reasserts on appeal that Detective Weathers' testimony was unduly prejudicial. He maintains that a mistrial was necessary because the jury could have believed from Detective Weathers' testimony that Hunter had enough prior contact with the jail for the jail personnel to know him well. Evidence tending to show the commission of a crime other than the one charged is admissible if it is relevant to an issue in the case, and the possibility of prejudice to the accused is outweighed by the probative worth and need for the evidence. Powell v. Commonwealth, Ky. App., 843 S.W.2d 908, 911 (1992); Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 674 (1990). "Evidence of criminal conduct other than that being tried, is admissible only if probative of an issue independent of character or criminal disposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character." Bell v. Commonwealth, Ky., 875 S.W.2d 882, 889 (1994) (quoting Billings v. Commonwealth, Ky., 843 S.W.2d 890, 892 (1992)). Evidence of other criminal or wrongful acts may be introduced as an exception to the general rule excluding evidence of other crimes to prove that an accused is a person of criminal disposition if the evidence is offered to show motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. Clark v. Commonwealth, Ky., 833 S.W.2d 793, 795 (1992); KRE 404(b). To be admissible under any of the exceptions, the other criminal or wrongful acts must be (1) relevant for some purpose other than to prove criminal predisposition, (2) sufficiently probative to warrant introduction, and (3) the probative value of the evidence outweighs its potential for prejudice to the accused. Clark, 833 S.W.2d at 795; Bell, 875 S.W.2d at 889-90; Drumm v. Commonwealth, Ky., 783 S.W.2d 380 (1990). Generally, rulings upon admissibility of evidence are within the discretion of the trial judge and should not be reversed on appeal absent a clear abuse of discretion. Simpson v. Commonwealth, Ky., 889 S.W.2d 781, 783 (1994); Pendleton v. Commonwealth, Ky., 685 S.W.2d 549, 554 (1985). More specifically, a ruling based on a proper balancing of prejudice against probative value will not be disturbed unless it is determined that the trial court abused its discretion. Bell, 875 S.W.2d at 890; Daniel v. Commonwealth, Ky., 905 S.W.2d 76, 78 (1995).

In the case sub judice, Hunter's counsel moved for a mistrial based on Detective Weathers' testimony. A defendant is entitled to a mistrial only upon a showing of "manifest necessity for such an action or an urgent or real necessity." Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 678 (1985), cert. denied, 476 U.S. 1130, 106 S. Ct. 1998, 90 L. Ed. 2d 678 (1986) (quoting Wiley v. Commonwealth, Ky. App., 575 S.W.2d 166, 168 (1979)). A trial

court has discretion in deciding whether to declare a mistrial, and its decision should not be disturbed absent an abuse of discretion. Turpin v. Commonwealth, Ky., 780 S.W.2d 619, 620 (1989), cert. denied, 494 U.S. 1058, 110 S. Ct. 1530, 108 L. Ed. 2d 769 (1990); Clay v. Commonwealth, Ky. App., 867 S.W.2d 200, 204 (1994).

The trial court did not abuse its discretion in admitting Detective Weathers' testimony. In reviewing an alleged abuse of discretion by a trial court, this court must consider both the circumstances surrounding the introduction of the testimony as well as the actual proof. Ruppee v. Commonwealth, Ky., 821 S.W.2d 484, 487 (1991). The information concerning Hunter's identity was relevant to connect the defendant to the indictment and falls within an exception listed in KRE 404(b). Hunter's main defense to the charges involved mistaken identity. In addition, the testimony was not highly prejudicial because it did not refer to any specific criminal act or misconduct. The Commonwealth elicited this testimony to provide background information on how the police discovered Hunter's name after he refused to voluntarily provide this information. The prejudicial effect did not outweigh the probative value of this evidence.

Similarly, Hunter has failed to demonstrate that the circuit court abused its discretion by refusing to declare a mistrial. Detective Weathers indicated that jail personnel come in contact with more persons than regular police officers. He did not state that anyone at the jail knew Hunter from a prior

arrest or commission of another crime. This testimony constituted a very brief remark with substantially obscure content. This testimony was not substantial or prejudicial enough to deny Hunter of a fair trial.

Hunter's second challenge concerns the trial court's refusal to grant his motion for a directed verdict. The standard for granting a directed verdict at trial and for review by an appellate court are set forth in Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). It provides in relevant part:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Id. at 187; See also, Commonwealth v. Collins, Ky., 933 S.W.2d 811, 815 (1996); Partin v. Commonwealth, Ky., 918 S.W.2d 219, 221 (1996); Dishman v. Commonwealth, Ky., 906 S.W.2d 335, 340 (1995).

Hunter's defense to the charges consisted of mistaken identity. During the drug transaction, the confidential informant stated the seller of the drugs was wearing a dark coat and red or maroon pants. At the trial, Hunter was wearing dark

black pants. Hunter argues that he was in jail from the date of arrest until the date of the trial. He further contends that the Commonwealth had to establish why Hunter had black pants at trial because the suspect's clothing was a primary means for identifying the perpetrator of the crime. We disagree.

The appellate standard of review is whether viewing the evidence as a whole a reasonable juror could find the defendant guilty. During the trial, the confidential informant identified Hunter as the person who sold him two (2) \$20.00 pieces of crack cocaine. The confidential informant also identified Hunter when he was taken back to the scene of the transaction by Officer Vifquain. Three (3) of the police officers involved in the operation identified Hunter as the only person standing near the confidential informant's automobile as they arrived on the scene. They also stated that Hunter was wearing a black jacket and maroon pants when he was arrested. The witnesses' testimony was consistent with the audiotape of the transaction, which was admitted into evidence. The property officer at the jail testified that the records indicated Hunter was wearing a dark coat and maroon pants when he entered the jail. When the police searched Hunter at the scene, they discovered a \$20.00 bill bearing the serial number of a bill given to the confidential informant by police for the drug buy. The police also found a crack pipe at Hunter's feet when they arrested him. Clearly, the evidence of Hunter's guilt in this case was overwhelming. A trial court is authorized to direct a verdict of acquittal only

if the prosecution produces no more than a scintilla of evidence of guilt. Edmonds. v. Commonwealth, Ky., 906 S.W.2d 343, 346 (1995) (citing Commonwealth v. Sawhill, Ky., 60 S.W.2d 3 (1983)). Viewing the evidence in the light most favorable to the Commonwealth, there was sufficient evidence for a reasonable juror to find Hunter guilty. The trial judge did not err by denying Hunter's motion for a directed verdict.

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Herbert T. West
Lexington, KY

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Suzanne Baker Hite
Assistant Attorney General
Frankfort, KY